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Judicial Treatment of the Antitrust Treatise

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Judicial Treatment of the Antitrust
Treatise

Hillary Greene* and D. Daniel Sokol**

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I. INTRODUCTION

Herbert Hovenkamp has had a tremendous impact in antitrust scholarship. With over 4000 citations in the Westlaw JLR database (most of which are for his antitrust scholarship), Hovenkamp is one of the most cited scholars in legal academia and has been recognized by the legal academy and the bar for his contribution to antitrust.¹ Hovenkamp's total citations are in part a function of his academic outputs; with 12 books (including monographs, edited books, and case books), plus the two-volume treatise on IP and Antitrust and the 21-volume *Antitrust Law: An Analysis of Antitrust Principles and Their Application* ("Treatise"),² Hovenkamp could fill multiple shelves of most libraries. He has also published over 200 book chapters, articles, and book reviews.

Hovenkamp's scholarship has not only shaped academic discourse but also that of the courts.³ Justice Breyer once remarked that litigants "would prefer to have two paragraphs of [the Areeda–Hovenkamp] treatise on their side than three Courts of Appeals or four Supreme Court Justices."⁴ One review of Hovenkamp's work explains, "Hovenkamp speaks with oracle-like authority on antitrust matters."⁵

This Essay examines Hovenkamp's influence on antitrust law and policy in the courts. Part II explains the role of the Treatise and Hovenkamp's academic writing in antitrust law and policy. This Part focuses primarily upon the Treatise within the merger law context—procedurally with issues of antitrust injury, and substantively with the case law regarding merger efficiencies. Additionally, this Essay provides a case count citation analysis of Hovenkamp's scholarship which indicates that Hovenkamp is cited more heavily than other prominent treatise writers or scholars in the field of antitrust law.

After Part III provides some initial meta-level explanations regarding Hovenkamp's "market power" in federal court opinions, this Essay undertakes a textual analysis of court citations to the Treatise and scholarship within the context of merger law both procedurally and substantively and, more specifically, antitrust injury (in Part IV) and the efficiencies "defense" (in

1. Bill Baer, *Connecting the Antitrust Dots: In Praise of Herb Hovenkamp*, 100 IOWA L. REV. BULL. 1, 1–2 (2014).

2. See Herbert Hovenkamp, *The Areeda–Turner Treatise in Antitrust Analysis*, 41 ANTITRUST BULL. 815, 816 (1996) (providing a history of *Antitrust Law: An Analysis of Antitrust Principles and Their Application* from its inception in 1978 through 1996). The Treatise was originally authored by Phillip E. Areeda and Donald F. Turner. *Id.* Hovenkamp's work on this enterprise began in 1984 and is ongoing. *Id.* Numerous scholars have contributed to the Treatise over the years including: Roger D. Blair, Christine Piette Durrance, Einer Elhague, and John L. Solow. See *id.* Its current volumes span the work's third or fourth edition.

3. See generally Rebecca Haw Allensworth, *The Influence of the Areeda–Hovenkamp Treatise in the Lower Courts and What It Means for Institutional Reform in Antitrust*, 100 IOWA L. REV. 1919 (2015).

4. Stephen Breyer, *In Memoriam: Phillip E. Areeda*, 109 HARV. L. REV. 889, 890 (1996).

5. Daniel A. Crane, *Antitrust Modesty*, 105 MICH. L. REV. 1193, 1193 (2007).

Parts V–VI). Notwithstanding the extraordinary citation count associated with the Treatise, to the extent that his ideas have become institutionalized, such numbers may even understate its influence.⁶ This is because citations to cases that embody its ideas do not necessarily cite to the Treatise. Part VII concludes that Hovenkamp has played an important role in the development of antitrust law.

II. ANTITRUST'S STRUCTURAL SHIFT AND THE ROLE OF THE TREATISE

The shape of antitrust's economics revolution in policy circles rests largely upon decided cases. At the macro level, in isolation, ideas do not shape case law. The institutional structure of the U.S. antitrust system is a function of the moment in time in which it was set up (its initial endowment) and its institutional development based upon case law and relevant policy developments.⁷ Though there is some path dependence to the initial endowment, over time the path dependence can be shifted to incorporate new developments in areas such as judicial interpretation, economic thinking, and broader macro-level government policies and priorities.⁸

During the 1970s, antitrust began its revolution to a more economics-based approach.⁹ Both procedurally and substantively, the antitrust doctrines of today bear little resemblance to those of a couple of generations ago.¹⁰ As Bohannon and Hovenkamp explain:

6. See *infra* text accompanying notes 92–93 (defining the concept of institutionalization).

7. Roger D. Blair & D. Daniel Sokol, *Welfare Standards in U.S. and E.U. Antitrust Enforcement*, 81 *FORDHAM L. REV.* 2497, 2506–09 (2013) [hereinafter Blair & Sokol, *Welfare Standards*]. On issues of how antitrust and its institutions matter to policy, see, for example, Roger D. Blair & Christine Durrance, *Licensing Health Care Professionals, State Action and Antitrust Policy*, 100 *IOWA L. REV.* 1943 (2015); Roger D. Blair & D. Daniel Sokol, *Quality-Enhancing Merger Efficiencies*, 100 *IOWA L. REV.* 1969 (2015); John M. Connor & Robert H. Lande, *Not Treble Damages: Cartel Recoveries Are Mostly Less Than Single Damages*, 100 *IOWA L. REV.* 1997 (2015); Daniel Crane, *All I Really Need to Know About Antitrust I Learned in 1912*, 100 *IOWA L. REV.* 2025 (2015); Keith N. Hylton, *Deterrence and Antitrust Punishment: Firms Versus Agents*, 100 *IOWA L. REV.* 2069 (2015); William E. Kovacic & Marc Winerman, *The Federal Trade Commission as an Independent Agency: Autonomy, Legitimacy, and Effectiveness*, 100 *IOWA L. REV.* 2085 (2015); Mark A. Lemley & Christopher R. Leslie, *Antitrust Arbitration and Illinois Brick*, 100 *IOWA L. REV.* 2115 (2015); Christopher R. Leslie, *The Commerce Requirement in Tying Law*, 100 *IOWA L. REV.* 2135 (2015); Alan J. Meese, *Antitrust Federalism and State Restraints of Interstate Commerce: An Essay for Professor Hovenkamp*, 100 *IOWA L. REV.* 2161 (2015); Barak Orbach, *The Durability of Formalism in Antitrust*, 100 *IOWA L. REV.* 2197 (2015); and Spencer Weber Waller & Matthew Sag, *Promoting Innovation*, 100 *IOWA L. REV.* 2223 (2015).

8. HERBERT HOVENKAMP, *THE ANTITRUST ENTERPRISE: PRINCIPLE AND EXECUTION* 11–30 (Harvard Univ. Press 2005) [hereinafter HOVENKAMP, *ANTITRUST ENTERPRISE*]; HERBERT HOVENKAMP, *THE OPENING OF AMERICAN LAW: NEOCLASSICAL LEGAL THOUGHT, 1870–1970*, at 210–39 (2015) [hereinafter HOVENKAMP, *OPENING OF AMERICAN LAW*].

9. See generally Vivek Ghosal, *Regime Shift in Antitrust Laws, Economics, and Enforcement*, 7 *J. COMPETITION L. & ECON.* 733 (2011) (providing empirical support for the shift to economic analysis).

10. See, e.g., Daniel A. Crane, *The Tempting of Antitrust: Robert Bork and the Goals of Antitrust Policy*, 79 *ANTITRUST L.J.* 835 (2014); Herbert Hovenkamp, *Robert Bork and Vertical Integration*:

The story of antitrust reform is well known. The half-century period that ended in the late 1970s had seen many antitrust infidelities, mainly from expansion that today seems unprincipled, given that injury to competition was so often absent.

....

Today, the antitrust landscape differs so much from the view of *Brown Shoe* that one could barely recognize it from that vantage point.^[11] The reformation of antitrust involved not only the development of a coherent theory of harm related to the underlying goals of the antitrust laws, but also a major revision in substance.¹²

With regard to both procedural and substantive goals, the shift in antitrust has been to incorporate workable legal rules based on the latest economic thinking.¹³ Hovenkamp's role in this transformation has been considerable.

The institutional structure within which this revolution occurred constrained antitrust to incremental movements from the mid-1970s to the present with a series of cases slowly reversing doctrine that arguably did not make economic sense.¹⁴ Antitrust's overall approach since the late 1970s is one largely guided by economic analysis based on a "consumer welfare" standard that analyzes competitive effects.¹⁵ The Treatise has aided in this shift by subtly changing its policy prescriptions in each edition.¹⁶

Leverage, Foreclosure, and Efficiency, 79 ANTITRUST L.J. 983 (2014); D. Daniel Sokol, *The Transformation of Vertical Restraints: Per Se Illegality, the Rule of Reason, and Per Se Legality*, 79 ANTITRUST L.J. 1003 (2014).

11. See, e.g., William E. Kovacic & Carl Shapiro, *Antitrust Policy: A Century of Economic and Legal Thinking*, 14 J. ECON. PERSP. 43, 49–52 (2000) (providing context for *Brown Shoe* and the cases of this era).

12. Christina Bohannon & Herbert Hovenkamp, *IP and Antitrust: Reformation and Harm*, 51 B.C. L. REV. 905, 908–12 (2010) (footnote omitted).

13. See generally Herbert Hovenkamp, *Harvard, Chicago, and Transaction Cost Economics in Antitrust Analysis*, 55 ANTITRUST BULL. 613 (2010) [hereinafter Hovenkamp, *Harvard, Chicago and Transaction Cost Economics*]; Herbert Hovenkamp, *Implementing Antitrust's Welfare Goals*, 81 FORDHAM L. REV. 2471 (2013) [hereinafter Hovenkamp, *Implementing Antitrust's Welfare Goals*].

14. See generally HOVENKAMP, ANTITRUST ENTERPRISE, *supra* note 8 (providing several examples throughout the text).

15. Hovenkamp, *Implementing Antitrust's Welfare Goals*, *supra* note 13, at 2477 (explaining the welfare goals under antitrust law).

16. The Treatise has developed to reflect economic theory and administrability concerns. Hovenkamp confirms that his writing in the Treatise is more conservative than his academic writing for exactly this reason. As Hovenkamp explains, "A good treatise must wed the case law, the relevant statutes, and the underlying theory into a coherent scheme that deserves to be called policy." Hovenkamp, *supra* note 2, at 842. One example in which Hovenkamp demonstrates Harvard concerns of administrability and a coherent economics based scheme is in the area of predatory pricing. Though more sophisticated economic models of predation exist that would expand the liability for such conduct, courts continue to use the Areeda–Turner test for predatory pricing primarily for two reasons: "First, it tends to keep predatory pricing cases out of court and away from juries, two properties that make it attractive to judges. Second, and more importantly, no one has been able to come up with something better." Herbert J. Hovenkamp,

As a coauthor of the leading antitrust treatise since 1984 and its primary author since 1992–1993, Hovenkamp has had the power to shape antitrust case development. Yet, how to use that power leads to difficult issues generally, an issue with which Hovenkamp has had to contend. Treatise writers in other fields have been far more intentional in their advocacy of shaping case law by suggesting that the law had already moved in a certain direction even when it had not.¹⁷ The ability to explain the law and advocate its shift is not always executed so crisply. As one article explains:

The treatise writer's dilemma is that while reliability requires faithful interpretation of the law as it stands, he or she must also remain sufficiently detached and forward-looking to assist decisionmakers in shaping the law as it ought to be. The better treatise writers resolve this tension by devising jurisprudential and methodological approaches that broaden the horizons of experienced practitioners in the field.¹⁸

Hovenkamp also grappled with the treatise writer's dilemma. As an Assistant Professor, he reviewed the first edition of Earl W. Kintner's treatise, *Federal Antitrust Law*. Hovenkamp was not yet an author on the Treatise. Hovenkamp explained that Kintner's treatise was "substantially less theoretical than its chief competitor, *Antitrust Law*, by Areeda and Turner. . . . However, someone reading their volumes cannot escape the impression that *Antitrust Law* is really Professors Areeda and Turner telling what antitrust law ought to be."¹⁹ Hovenkamp has been very careful in his stewardship of the Treatise to both explain the law as well as to advocate how to shift it to make more economic sense in a way that is administrable. With multiple volumes,

The Areeda–Turner Test for Exclusionary Pricing: A Critical Journal 18 (Univ. Iowa Legal Studies Research, Paper No. 15-06, 2015), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2422120. In 1983, Hovenkamp wrote an article suggesting a market structure screen to make the Areeda–Turner test less prone to error. Herbert Hovenkamp & Avarelle Silver-Westrick, *Predatory Pricing and the Ninth Circuit*, 1983 ARIZ. ST. L.J. 443, 482 ("[P]redatory pricing is a real problem only in concentrated markets that are conducive to monopolization, and even then only when the defendant is a dominant firm."). Hovenkamp explained how a predatory pricing rule had to be administrable and lead to few error costs. Such thinking survives in the Treatise with regard to treatment of predatory pricing, including how predatory pricing claims may be examined specifically in the private-merger context as a possible result of a post-consummated merger. This thinking also has become adopted by a number of courts. See, e.g., *Coastal Fuels of P.R., Inc. v. Caribbean Petroleum, Corp.*, 79 F.3d 182, 192–93 (1st Cir. 1996); *Rebel Oil Co. v. Atl. Richfield Co.*, 51 F.3d 1421, 1440 (9th Cir. 1995); *United States v. AMR Corp.*, 140 F. Supp. 2d 1141, 1196–97 (D. Kan. 2001).

17. See, e.g., Craig Joyce, *Keepers of the Flame: Prosser and Keeton on the Law of Torts (Fifth Edition) and the Prosser Legacy*, 39 VAND. L. REV. 851, 855–56 (1986) (book review).

18. J.H. Reichman, *Goldstein on Copyright Law: A Realist's Approach to a Technological Age*, 43 STAN. L. REV. 943, 943 (1991) (book review).

19. Herbert Hovenkamp, Book Review, 15 U.C. DAVIS L. REV. 521, 522 (1981) (footnote omitted).

the Treatise has many moving pieces that must be internally consistent and not too aggressive in its policy prescriptions lest courts ignore it.

The Treatise's analytical approach only partially explains its influence—Hovenkamp's impact has been particularly great in the courts because the courts were undergoing a revolution towards the greater use of economics to guide case law (moving beyond structure-conduct-performance regarding substantive antitrust issues and showing a greater concern regarding error costs from false positives), and antitrust law takes a particularly common-law approach relative to many other areas of law. Antitrust case law development is primarily federal law, unlike other famous treatises such as contracts, torts, and property; it is also not heavily code-based. Thus, the statutory regime in antitrust is very limited and stands in contrast to many areas of administrative law.²⁰ The common-law approach to antitrust is by design.²¹ Congress enacted antitrust statutes that were purposely vague in order to allow the common law to develop antitrust jurisprudence.²² As to timing, Hovenkamp became an academic precisely as antitrust began a structural shift towards an economics-based understanding of the field with a singular economics-based goal for law and policy.²³

Next, this Essay will illustrate Hovenkamp's general influence on the shape of case law. Finally, the Essay will focus on his scholarship and the Treatise in refining the law of mergers both as to procedure—with a focus on antitrust injury in private merger litigation and substance—and as to efficiencies.

III. HOVENKAMP'S INFLUENCE IN ANTITRUST'S REVOLUTION

In this Part we present citation-based evidence of the great influence of Hovenkamp on antitrust in the past half-century. As a reference, there are also citation counts to two other leading antitrust thinkers, Robert Bork and Richard Posner.²⁴ All three published books and articles that advocated important changes for the antitrust doctrine.²⁵ This Essay also compares the

20. See D. Daniel Sokol, *Antitrust, Institutions, and Merger Control*, 17 GEO. MASON L. REV. 1055, 1063 (2010).

21. See William F. Baxter, *Separation of Powers, Prosecutorial Discretion, and the "Common Law" Nature of Antitrust Law*, 60 TEX. L. REV. 661, 663 (1982).

22. Sokol, *supra* note 20, at 1063.

23. See Christopher R. Leslie, *Antitrust Made (Too) Simple*, 79 ANTITRUST L.J. 917, 919 (2014).

24. Bork's antitrust writing was the subject of two symposia in 2014 (after his death)—one in the *Antitrust Law Journal* and one in the *Journal of Law and Economics*. Posner's antitrust influence has been acknowledged even by some of his harshest critics. See Thomas E. Kauper, *Influence of Conservative Economic Analysis on the Development of the Law of Antitrust*, in HOW THE CHICAGO SCHOOL OVERSHOT THE MARK: THE EFFECT OF CONSERVATIVE ECONOMIC ANALYSIS ON U.S. ANTITRUST 40, 46 (Robert Pitofsky ed., 2008).

25. See ROBERT H. BORK, *THE ANTITRUST PARADOX: A POLICY AT WAR WITH ITSELF* (1993); HOVENKAMP, *ANTITRUST ENTERPRISE*, *supra* note 8; RICHARD A. POSNER, *ANTITRUST LAW: AN ECONOMIC PERSPECTIVE* (1976).

influence of the two important multiple volume antitrust treatises of the past 50 years: Areeda–Turner–Hovenkamp and Kintner.

We measure changes in antitrust thinking through a citation analysis of federal antitrust cases from January 1979 to August 2014 in the Westlaw ALLFEDS database. This period covers Hovenkamp’s teaching career and much of the most recent generation of shifts in antitrust’s revolution. From this population of cases, we construct the citation count of the Treatise since Hovenkamp was added as an author of the Treatise.²⁶ We also note that Hovenkamp has 124 citations for his non-Treatise scholarship. This includes nine citations that cite to both the Treatise and to Hovenkamp’s non-Treatise work.

Though recognizing that citation counts are an imperfect measure, the number of citations is generally acknowledged to be at least positively correlated with influence.²⁷ This also holds true of citations in the court context.²⁸ There are two rationales for using this measure in addition to its ease of calculation. First, influence in terms of citations may reflect quality. Strong work will be cited in support of a legal position because the citation brings additional clarity to the legal analysis in a court’s decision. The best ideas will also prevail in the marketplace of ideas, and this will be reflected in the courts.²⁹ There may also be branding effects of citations to a famous scholar.³⁰ For example, the Hovenkamp brand in the form of a citation may signal quality and reduce search costs for judges.³¹ The Breyer quotation on the importance of the Treatise noted earlier is an example of the power of the Hovenkamp brand.

26. We are cautious of counting cases merely for the sake of counting cases. Erwin Chemerinsky, *No Warrant for Radical Change: A Response to Professors George and Guthrie*, 58 DUKE L.J. 1691, 1701 (2009) (“Empirical research about judging can be enormously valuable if it provides important insights into courts and judicial behavior. But empirical research can do great harm if it is assumed that something matters just because it can be measured and if it is allowed to substitute for careful normative analysis and arguments.”).

27. See, e.g., Theodore Eisenberg & Martin T. Wells, *Ranking and Explaining the Scholarly Impact of Law Schools*, 27 J. LEGAL STUD. 373 (1998); Brian Leiter, *Measuring the Academic Distinction of Law Faculties*, 29 J. LEGAL STUD. 451 (2000).

28. See, e.g., DAVID E. KLEIN, MAKING LAW IN THE UNITED STATES COURTS OF APPEALS 65 (2002); Gregory A. Caldeira, *On the Reputation of State Supreme Courts*, 5 POL. BEHAV. 83, 83–84 (1983); Gregory A. Caldeira, *The Transmission of Legal Precedent: A Study of State Supreme Courts*, 79 AM. POL. SCI. REV. 178, 180 (1985); Charles A. Johnson, *Citations to Authority in Supreme Court Opinions*, 7 LAW & POL’Y 509, 509 (1985).

29. RICHARD A. POSNER, THE PROBLEMS OF JURISPRUDENCE 115–19 (1990).

30. See generally Benjamin Klein & Keith B. Leffler, *The Role of Market Forces in Assuring Contractual Performance*, 89 J. POL. ECON. 615 (1981) (suggesting that a strong brand reduces search costs).

31. William M. Landes et al., *Judicial Influence: A Citation Analysis of Federal Courts of Appeals Judges*, 27 J. LEGAL STUD. 271, 275–76 (1998).

The citation count-based impacts are somewhat limited because they only measure the number of citations.³² They do not, for example, measure positive versus negative citations (a negative citation would suggest lower quality) or how important the citation is for an opinion— is the citation part of a string cite, or is the citation used for purposes of establishing greater authority? Other issues include the frequency with which citations are within the opinion, whether there are extended block quotes, and how closely an opinion tracks the substantive leanings of the writer as opposed to being a mere restatement of the law. Lastly, the breadth and updating of the treatises is very different. Hovenkamp's Treatise is longer than its primary competitor.³³ As a result, this more expansive coverage lends itself more easily to citation.

A. *THE INFLUENCE OF HOVENKAMP AND OTHER PROMINENT ANTITRUST THINKERS*

Hovenkamp is, by far, the most cited antitrust scholar in the courts in recent decades. The closest comparisons in terms of citations in court decisions are academics with significant careers as circuit court judges, for example, Robert Bork and Richard Posner. As judges, Bork and Posner, of course, influenced the shape of antitrust law in their opinions, which this study does not measure.

Citations to case law may be dissimilar to citations to scholarship in part because they are cited for authority due to their precedential value. This is not so for a treatise or for scholarship. A judge's use of scholarship or a treatise suggests a different use of authority than that of a case, even a well-reasoned case. A well-regarded treatise has case-like authority at times in terms of a string cite. However, a case cannot be overturned based merely on a treatise entry as it could based on a prior holding favoring the opposite outcome. Put differently, citations to cases constitute a different "relevant market" than citations to scholarship.

In total, there are 473 district court decisions, 328 court of appeals decisions and 23 Supreme Court decisions that cite to the Treatise or to Hovenkamp's scholarship since Hovenkamp became a co-author in 1984. These scholarship citation levels are much larger, for example, than those of Bork and Posner. The difference in citation counts from 1990 to the present

32. Laura Denvir Stith, Response, *Just Because You Can Measure Something, Does It Really Count?*, 58 DUKE L.J. 1743, 1748 (2009) (noting a "numbers game" that emphasizes "quantity rather than quality").

33. Kintner's treatise is nine volumes including the index and was revised in 2014. Part of the breadth of the Treatise comes from Hovenkamp's analysis about what the law should be, rather than just a summary of how the law stands. See *infra* Part III.B.

(the last 25 years) is much starker. During that period, federal courts have cited Bork 58 times, Posner 31 times, and Hovenkamp 781 times.³⁴

Both Bork and Posner wrote books and articles attacking the very foundation of substantive antitrust.³⁵ As such, a comparison of Hovenkamp versus these two thinkers might not be equivalent comparisons since many of the Hovenkamp citations go to questions of law rather than policy. Hovenkamp also has a much richer set of writings on antitrust in terms of scope of writing and depth on particular issues of antitrust substance and procedure relative to Bork and Posner, neither of whom continued to regularly write on antitrust topics since the 1980s. Perhaps Hovenkamp's topic choice and writing style in both his academic works and his Treatise also contribute to the growing gap between Hovenkamp and the other writers in terms of academic citations.

B. CITATION ANALYSIS REGARDING THE ROBERTS COURT

To provide a more compatible set of comparisons, we analyze the substantive antitrust decisions of the current Roberts-led Supreme Court. Citations to the Treatise during the Roberts Court have gone through at least one edition of a post-Areeda Treatise. We detail the nature of the citations to Hovenkamp during this period.³⁶

We note that judicial citations may be a function of what gets cited in the parties' briefs before the Court. Scholars may be referenced even when the point is not unique to their writing. Such scholarship develops its authority as much by who says it as by who says it first. Framing an already existing idea is itself an important contribution. The reason that courts—in our case, the Supreme Court—cite authority may be a function of how Justices deal with uncertainty. They may cite to established authority when there is less certainty because the authority has its own branding effect.³⁷

Sometimes Hovenkamp is cited more because he has written substantive articles on the topic and the others lack Hovenkamp's breadth of writing or

34. Within the Roberts Court era, the Supreme Court cited to Bork's scholarship only three times, none more recent than 2007, and did not cite to Posner's scholarship. *See* cases cited *infra* Part III.C.

35. Herbert Hovenkamp, *The Rationalization of Antitrust*, 116 HARV. L. REV. 917, 917 (2003) (reviewing RICHARD A. POSNER, *ANTITRUST LAW* (2d ed. 2001)); William E. Kovacic, *Out of Control? Robert Bork's Portrayal of the U.S. Antitrust System in the 1970s*, 79 ANTITRUST L.J. 855, 857 (2014).

36. Every Supreme Court substantive antitrust decision in this period has cited to Hovenkamp while citing to the scholarship of Bork and Posner much less. These statistics do not, however, take into account citations to decisions written by Posner, the most cited non-Supreme Court jurist of all time. Stephen J. Choi & G. Mitu Gulati, *Mr. Justice Posner? Unpacking the Statistics*, 61 N.Y.U. ANN. SURV. AM. L. 19, 28 (2005). Posner also has written 45 decisions involving antitrust issues.

37. *See* Armen A. Alchian, *Uncertainty, Evolution, and Economic Theory*, 58 J. POL. ECON. 211, 217–20 (1950); Paul J. DiMaggio & Walter W. Powell, *The Iron Cage Revisited: Institutional Isomorphism and Collective Rationality in Organizational Fields*, 48 AM. SOC. REV. 147, 152 (1983); David S. Scharfstein & Jeremy C. Stein, *Herd Behavior and Investment*, 80 AM. ECON. REV. 465, 465 (1990).

depth on certain doctrinal subtleties. However, other times Hovenkamp is cited via the Treatise for points that are as much a restatement of where the law is or a synthesis of the scholarly view of where the law should be rather than a unique innovation to the doctrinal or economic analysis. For this reason, often both sides on a particular case will use Hovenkamp and the Treatise as the bases for their points.³⁸ A more detailed reading of Hovenkamp's influence on these decisions follows.

C. HOW HAS THE ROBERTS COURT CITED HOVENKAMP?

The Roberts Supreme Court decided its first two antitrust decisions in 2006. In *Illinois Tool Works Inc. v. Independent Ink, Inc.*, a case involving whether a patent right presumes monopoly power and the use of a per se standard for patent tying, the Court unanimously ruled citing Hovenkamp four times.³⁹ The Court cited Hovenkamp on patent misuse as authority at the end of a sentence. The second Hovenkamp citation was on the topic of how intellectual property rights do not automatically confer monopoly power. This second citation was in a footnote and included a quote from the Treatise and from Hovenkamp's Antitrust-IP treatise.

That same year, the Court also decided *Volvo Trucks North America, Inc. v. Reeder-Simco GMC, Inc.*, a case involving secondary line price discrimination under the Robinson-Patman Act, citing Hovenkamp three times.⁴⁰ The first time was to explain the origins of the Robinson-Patman Act, with the second to describe coverage of the Act. The third citation was to quote Hovenkamp's analysis on the Eighth Circuit's expansive interpretation of the Robinson-Patman Act.

In 2007, the Supreme Court decided three substantive antitrust cases.⁴¹ First, in *Credit Suisse Securities (USA) LLC v. Billing*, a case holding that securities law precluded antitrust law, the Court cited Hovenkamp twice.⁴² One involved a quote from an article and the second a citation (along with a citation to a court) on how financial institutions do not manipulate the market for Initial Public Offerings for antitrust purposes. The second was a monopsony case, *Weyerhaeuser Co. v. Ross-Simmons Hardwood Lumber Co., Inc.*⁴³ There, the Court based its claim that monopsony and monopoly were analytically similar on a Hovenkamp article.⁴⁴ Finally, in *Leegin Creative Leather Products, Inc. v. PSKS*,

38. This is not unique to antitrust. A similar situation occurs in Rabbinical commentary. See generally Jeffrey I. Roth, *The Justification for Controversy Under Jewish Law*, 76 CALIF. L. REV. 337 (1988).

39. See, e.g., *Ill. Tool Works Inc. v. Indep. Ink, Inc.*, 547 U.S. 28, 42 (2006).

40. See, e.g., *Volvo Trucks N. Am., Inc. v. Reeder-Simco GMC, Inc.*, 546 U.S. 164, 175 (2006).

41. The procedural antitrust case was *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), one of the most important procedural cases of all time and already cited over 251,000 times as of March 16, 2015.

42. See, e.g., *Credit Suisse Sec. (USA) LLC v. Billing*, 551 U.S. 264, 282 (2007).

43. *Weyerhaeuser Co. v. Ross-Simmons Hardwood Lumber Co., Inc.*, 549 U.S. 312 (2007).

44. *Id.* at 321.

Inc., the Supreme Court overturned the per se status of minimum resale price maintenance.⁴⁵ The Court cited Hovenkamp ten times, including five times by the dissent, on a variety of issues.⁴⁶

Subsequently, the Court quoted Hovenkamp twice in *Pacific Bell Telephone Co. v. Linkline Communications, Inc.*⁴⁷ and cited or quoted Hovenkamp eight times in *American Needle, Inc. v. National Football League*.⁴⁸ Similarly, in 2013, the Court quoted Hovenkamp twice in *Federal Trade Commission (“FTC”) v. Phoebe Putney Health System, Inc.*⁴⁹ regarding the purpose of state action and on market concentration and twice on the dynamics of reverse payments and settlement, and cited him a total of 11 times—including twice by the dissent—in *FTC v. Actavis, Inc.*⁵⁰

The overall picture of citations to Hovenkamp in the Roberts Court’s substantive antitrust decisions is that the citations are frequent and meaningful. Often, the Court quotes him. When the Court cites him without a quote, often, the citation is by itself, rather than as part of a string cite. Moreover, Hovenkamp has been cited in every substantive antitrust decision since 2007. When the briefs of the parties are included in the analysis, Hovenkamp has significantly more citations to his scholarship—on both sides—than, for example, Bork and Posner for points both large and small. Hovenkamp seems to be a basis for which to establish authority for a factual or analytical point by the parties for persuasive purposes to the Justices. These data offer some support to the claim made by Justice Breyer, himself a former professor of antitrust law, as to the power of the Treatise, given our earlier qualifications of the use of citation counts.

D. HOVENKAMP COMPARED TO OTHER ANTITRUST TREATISES

Where Hovenkamp’s influence is most pronounced is vis-à-vis the other antitrust treatises. In part, this is a function of the greater depth and breadth of the much more substantial Treatise relative to its peers. As the leading treatise, the Treatise also benefits from earlier precedents citing to it. There are, however, competitors. A practitioner started the Kintner treatise as a doctrinal treatise. One left-leaning scholar, Bauer, and two right-leaning scholars, Lopatka and Page, took over that treatise. It is nine volumes long, including the index. The courts have cited the Areeda–Hovenkamp treatise 743 times and the Kintner treatise 125 times. The citation count of the treatises also reflects Hovenkamp’s relative influence in Supreme Court cases among

45. *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 551 U.S. 877, 899, 906–07 (2007).

46. *See, e.g., id.* at 889.

47. *See, e.g., Pac. Bell Tel. Co. v. Linkline Commc’ns, Inc.*, 555 U.S. 438, 455 (2009).

48. *See, e.g., Am. Needle, Inc. v. Nat’l Football League*, 560 U.S. 183, 190 (2010).

49. *See, e.g., Fed. Trade Comm’n v. Phoebe Putney Health Sys., Inc.*, 133 S. Ct. 1003, 1012 (2013).

50. *See, e.g., Fed. Trade Comm’n v. Actavis, Inc.*, 133 S. Ct. 2223, 2227 (2013).

the treatises. The Court has cited Hovenkamp 23 times, while it has cited Kintner only once.⁵¹

IV. HOVENKAMP AND PROCEDURAL ANTITRUST IN MERGERS

Perhaps the area in which the impact of Hovenkamp has been greatest in terms of citations is in the area of antitrust injury and standing, with 162 citations in federal courts. It is not surprising, since a win on procedural grounds of standing or injury means that a decision-maker would never get to the substantive issue in a case. How courts made sense of the legal morass regarding various issues in antitrust standing and injury provides a snapshot of how one area of antitrust procedural law transformed over time to become more internally coherent by creating various screens to promote outcomes that were more pro-defendant but not so much as the Chicago position.⁵²

We analyze antitrust injury in the context of private merger suits, a subset of all of antitrust injury cases. To do so, we first explain antitrust injury and its origins. The genesis of intellectual thought on antitrust injury stems at least to Areeda and his 1976 article in which he suggested the need for actual harm on competition, because there was no predation, and criticized the Third Circuit opinion in what would eventually become *Brunswick* when appealed to the Supreme Court.⁵³ Areeda and Hovenkamp were not alone in writing on antitrust injury matters. Chicago scholars also embraced antitrust injury. Areeda, in his very fact-based approach, did not provide guiding principles for making injury more coherent. In contrast, Chicago scholars pushed efficiency⁵⁴ and were suspicious of any competitor suit.⁵⁵

In the case law, the Supreme Court created an antitrust injury requirement in *Brunswick*. That case involved a merger challenge by a group of bowling alley operators. They alleged that the industry-leading producer of bowling equipment, Brunswick, had made illegal acquisitions of bowling centers under section 7 of the Clayton Act. The plaintiff bowling alley operators alleged that their own bowling alleys would have been more profitable had the Brunswick acquisitions gone out of business rather than being acquired. In that case, the Supreme Court explained that antitrust injury is “injury of the type the antitrust laws were intended to prevent and

51. See, e.g., *Texaco Inc. v. Hasbrouck*, 496 U.S. 543, 553 n.10 (1990) (citing Kintner).

52. See generally William H. Page, *The Chicago School and the Evolution of Antitrust: Characterization, Antitrust Injury, and Evidentiary Sufficiency*, 75 VA. L. REV. 1221 (1989) (providing an explanation and analysis).

53. Phillip Areeda, Comment, *Antitrust Violations Without Damage Recoveries*, 89 HARV. L. REV. 1127, 1127, 1134 (1976).

54. Frank H. Easterbrook, *The Limits of Antitrust*, 63 TEX. L. REV. 1, 13, 24, 33-40 (1984); William H. Page, *Antitrust Damages and Economic Efficiency: An Approach to Antitrust Injury*, 47 U. CHI. L. REV. 467, 471 (1980).

55. See generally Frank H. Easterbrook, *Predatory Strategies and Counterstrategies*, 48 U. CHI. L. REV. 263 (1981).

that flows from that which makes defendants' acts unlawful."⁵⁶ The Court found that since the defendant's behavior had been pro-competitive, the plaintiff could not be awarded treble damages unless the defendant had created an antitrust injury.⁵⁷

The Treatise explains the rationale for antitrust injury following the analysis of *Brunswick* as:

Compensation for that injury must be consistent with the purposes of antitrust law generally and with the rationale for condemning the particular defendant. . . . At its most fundamental level, the antitrust injury requirement precludes any recovery for losses resulting from competition, even though such competition was actually caused by conduct violating the antitrust laws.⁵⁸

Injury means not merely that the competitors have been injured but that such injury is a result of something other than efficiency-enhancing.⁵⁹ If consumers are better off, then there is no injury.

Hovenkamp has been concerned that, though competitors may have more information than customers about certain business practices, they also are just as likely to be harmed by conduct due to efficiencies rather than anti-competitive means. Consequently, the Treatise took the position, based in part on Hovenkamp's academic writing, starting in the late 1980s,⁶⁰ that antitrust injury should screen out situations that on average were a result of efficient behavior. The Treatise advocated in particular, "expanded summary judgment, relatively strict proof of damages, and the array of 'standing' doctrines that include injury-in-fact, proximity, antitrust injury, causation, and the like."⁶¹ These shifts in the Treatise seem to have impacted case law and pushed it in the direction of limiting cases to those that showed that the plaintiff suffered an economic-based antitrust injury.

Hovenkamp has helped to gradually push injury in a direction of limiting, but not eliminating, antitrust injury suits. His initial writing in the area was in 1984, in which he advocated the adoption of a reading of *Brunswick* such that while increased efficiency will not yield antitrust injury, increased post-merger market power may do so.⁶²

56. *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 489 (1977).

57. *Id.*

58. 2 PHILLIP E. AREEDA, ROGER D. BLAIR & HERBERT HOVENKAMP, *ANTITRUST LAW: AN ANALYSIS OF ANTITRUST PRINCIPLES AND THEIR APPLICATION* ¶ 337a, at 306 (2d ed. 2000).

59. Whether or not the court meant antitrust injury to mean total welfare or consumer welfare is unclear, but the difference in this case would not have impacted whether or not there was a cognizable antitrust claim.

60. See generally Herbert Hovenkamp, *Antitrust's Protected Classes*, 88 MICH. L. REV. 1 (1989).

61. Hovenkamp, *supra* note 2, at 829 (footnote omitted).

62. Herbert Hovenkamp, *Merger Actions for Damages*, 35 HASTINGS L.J. 937, 958 (1984).

The Supreme Court extended the antitrust injury concept for private plaintiffs regarding the merger in *Cargill v. Monfort of Colorado*.⁶³ The case involved a competitor's challenge to a merger between the second and third largest beef packers in the country. Monfort believed that it would be harmed if the merged firm could lower its prices, based on efficiencies, to a level below Monfort's prices but above the merged firm's cost.

Beyond the facts of the case, *Cargill* is important because of the influence of Areeda in the decision. Areeda was cited in the briefs of the Petitioner, the Solicitor General, and FTC, and the Respondent—all of whom referenced the Treatise, though the Court did not. The Supreme Court ruled in favor of Cargill, explaining, “[t]o hold that the antitrust laws protect competitors from the loss of profits due to such price competition would, in effect, render illegal any decision by a firm to cut prices in order to increase market share. The antitrust laws require no such perverse result.”⁶⁴

Cargill made the likelihood of finding of competitor standing more difficult for private plaintiffs, borrowing the antitrust injury concept from private plaintiff cases of section 4 of the Clayton Act. However, it did not create a rule of per se legality as some Chicago thinkers advocated. *Cargill* left the door open to further refinement of antitrust injury in the merger context because it ruled that there was no showing under Clayton Act section 16. This in turn meant that the Court never reached the question whether the proposed merger violated Clayton Act section 7.

Because the answer in *Cargill* was not definitive, courts looked at specific facts to determine injury.⁶⁵ Much like the Court, Hovenkamp was unwilling to close the door to injury on competitors. Instead, in his 1989 article he argued that according to legislative history “competitors, at least as much as consumers, are to be considered among antitrust’s protected classes.”⁶⁶ As the selected case law description and analysis below will show, each subsequent private antitrust injury merger case created an opportunity to address the particular attributes of the case for or against antitrust injury. The number of cases in which courts allowed a private suit to proceed dropped as plaintiffs could not meet antitrust injury requirements. These requirements also were heightened depending on the remedy sought.⁶⁷

In *Alberta Gas Chemicals Ltd. v. E.I. Du Pont De Nemours & Co.*, the court cited to Hovenkamp’s article *Merger Actions for Damages* and the Treatise multiple times to explain that efficiencies might cause competitors harm.⁶⁸ In *Sterling Merchandising, Inc. v. Nestlé, S.A.*, the competitor plaintiff saw its

63. *Cargill, Inc. v. Monfort of Colo.*, 479 U.S. 104 (1986).

64. *Id.* at 116.

65. See HERBERT HOVENKAMP, ECONOMICS AND FEDERAL ANTITRUST LAW § 11.9, at 317 (1985).

66. Hovenkamp, *supra* note 60, at 27.

67. See Hovenkamp, *supra* note 2, at 827–28.

68. See *Alberta Gas Chems. Ltd. v. E.I. Du Pont De Nemours & Co.*, 826 F.2d 1235, 1239 (3d Cir. 1987) (citing Hovenkamp, *supra* note 62, at 956); see also *id.* at 1245 n.8.

competitive situation improve post-merger.⁶⁹ The plaintiff alleged that but for the merger and subsequent activity, its competitive situation would have improved even more.⁷⁰ The court cited the Treatise for the proposition that if there is no harm to competition, there is no antitrust injury.⁷¹ Other cases such as *Ansell Inc. v. Schmid Laboratories, Inc.*, a merger case involving condom companies in which the court found no antitrust injury, cited the Treatise for the proposition that private plaintiffs must show both an injury and a violation of the statute.⁷² Similarly, in *Sprint Nextel Corp. v. AT & T Inc.*, the court quoted *Atlantic Richfield Co. v. USA Petroleum Co.*, for the narrow grounds for which antitrust injury can be found and held that the plaintiff met the injury requirement on some claims but not others.⁷³ *Atlantic Richfield Co.* in turn cited to Hovenkamp for that proposition.⁷⁴ The same pattern of citations can be found in *Pacific Express, Inc. v. United Airlines, Inc.*,⁷⁵ where the court found no antitrust injury because the injury was not a result of either anticompetitive or predatory conduct, but rather of increased competition.

Subsequent cases rely upon the Treatise to explain the rationale for antitrust injury in allowing for certain private merger challenges to survive motions for summary judgment. For example, *Appraisers Coalition v. Appraisals Institute* quoted the Treatise to explain the purpose of antitrust injury in the merger setting as aiding courts because “[i]t forces the parties and the court to reason closely about the nature of the antitrust violation alleged in order to test whether the injury and damages claimed by the plaintiff match the rationale for finding any violation in the first place.”⁷⁶ The *Appraisers* court relied upon this rationale for antitrust injury (as well as the need for antitrust law to protect consumers, not competitors, from injury) as the basis for denying the defendants’ motion to dismiss for lack of associational standing.⁷⁷

69. *Sterling Merch., Inc. v. Nestlé, S.A.* 656 F.3d 112, 116–17 (1st Cir. 2011).

70. *Id.* at 117.

71. *Id.* at 121 (“Even if a competitor is hurt because the merger of its rivals makes them more efficient or able to compete more aggressively, that harm is not an antitrust violation, and the competitor lacks standing.” (citing 2 AREEDA & HOVENKAMP, *supra* note 58, ¶ 348a, at 387)).

72. *Ansell Inc. v. Schmid Labs., Inc.*, 757 F. Supp. 467, 484 (D.N.J. 1991).

73. *Sprint Nextel Corp. v. AT & T Inc.*, 821 F. Supp. 2d 308, 314–15, 337 (D.D.C. 2011) (quoting *Atl. Richfield Co. v. USA Petrol. Co.*, 495 U.S. 328, 342–44 (1990)).

74. *Atl. Richfield Co.*, 495 U.S. at 344 (“Thus, ‘proof of a per se violation and of antitrust injury are distinct matters that must be shown independently.’ . . . For this reason, we have previously recognized that even in cases involving *per se* violations, the right of action under [section] 4 of the Clayton Act is available only to those private plaintiffs who have suffered antitrust injury.” (quoting PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW: AN ANALYSIS OF ANTITRUST PRINCIPLES AND THEIR APPLICATION ¶ 334.2c, at 330 (Supp. 1989))).

75. *Pac. Express, Inc. v. United Airlines, Inc.*, 959 F.2d 814, 818 (9th Cir. 1992) (citing to *Atlantic Richfield Co.* but not including the underlying citation to the Treatise).

76. *Appraisers Coal. v. Appraisal Inst.*, 845 F. Supp. 592, 601 (N.D. Ill. 1994) (quoting PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW: AN ANALYSIS OF ANTITRUST PRINCIPLES AND THEIR APPLICATION ¶ 334.2a, at 389 (Supp. 1992)) (internal quotation marks omitted).

77. *Id.* at 601–02.

Similarly, in *R.C. Bigelow, Inc. v. Unilever N.V.*, the court cited Hovenkamp along with *Alberta Gas* to suggest a narrow application of antitrust injury.⁷⁸ One factor that allowed for a finding of antitrust injury in *Bigelow* as opposed to *Cargill* was a difference between the low market share in *Cargill* versus high market share in *Bigelow*. The market share presumption can be traced back to how the Treatise uses market share as a screen for injury.⁷⁹

In another merger case of that period, *Community Publishers, Inc. v. Donrey Corp.*, the U.S. District Court for the Western District of Arkansas held that the *Daily Record* had antitrust standing.⁸⁰ The standing allowed the *Daily Record* to challenge the merger of two local competitors.⁸¹ In finding for the plaintiffs, the court relied on the Treatise five times in its analysis on antitrust injury.⁸² This included accepting the Areeda and Hovenkamp market share screen and the need for a high threshold for reaching antitrust injury.⁸³

In *AlliedSignal, Inc. v. B.F. Goodrich Co.*, the Seventh Circuit held that there was no abuse of discretion by the district court in finding antitrust standing.⁸⁴ The court relied upon the Treatise to support the notion that “[a] competitor in the merging industry ordinarily lacks antitrust standing because that competitor would generally only stand to gain from the increase in prices.”⁸⁵ However, the Seventh Circuit found that the factual record supported that, at the preliminary stage of the case, the competitor had shown injury and hence standing.⁸⁶ In addition to citing to the Treatise as authority, the court also cited to the Supreme Court in *Cargill* and to an appellate court case.⁸⁷ In this decision, the court seems to have treated the Treatise’s authority akin to that of court decisions.

Many of the antitrust injury merger cases cite Hovenkamp and/or the Treatise for authority. Even in cases that do not, there are citations to cases which refer to the insights, and not just the restatement, of the Treatise. The cases suggest that Hovenkamp has helped to shape antitrust injury case law in the merger context.

V. BASIC CITATION STATISTICS REGARDING ANTITRUST MERGER RULINGS

Part V examines general statistics regarding Treatise citations in select judicial rulings involving substantive merger determinations. These merits-based decisions include temporary restraining orders, preliminary

78. *R.C. Bigelow, Inc. v. Unilever N.V.*, 867 F.2d 102, 111 (2d Cir. 1989).

79. This was first articulated in Hovenkamp & Silver-Westrick, *supra* note 16, at 481–82.

80. *Cnty. Publishers, Inc. v. Donrey Corp.*, 892 F. Supp. 1146, 1165–67 (W.D. Ark. 1995).

81. *Id.*

82. *See, e.g., id.* at 1154 n.9.

83. *Id.* at 1167 n.16.

84. *AlliedSignal, Inc. v. B.F. Goodrich Co.*, 183 F.3d 568, 576 (7th Cir. 1999).

85. *Id.*

86. *Id.*

87. *Id.*

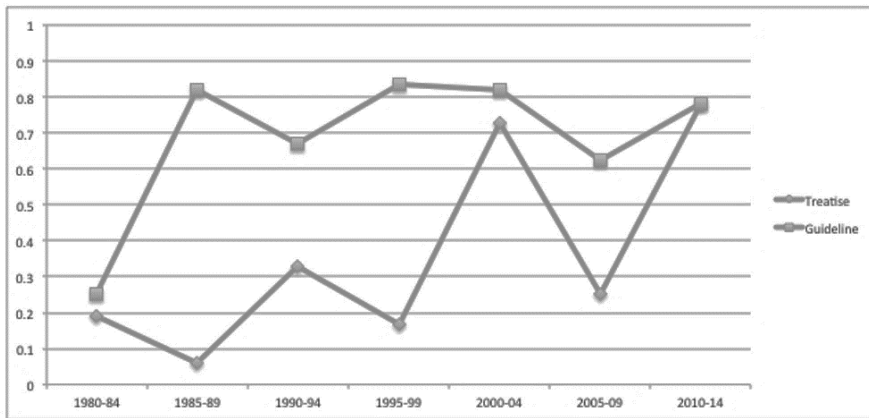
injunctions, and final determinations or appeals therefrom regarding alleged Clayton Act section 7 violations.⁸⁸ Federal court merger opinions between 1980 and 2014, both published and unpublished that involve the Department of Justice (“DOJ”) or the FTC, constitute the data for the statistical exercise.⁸⁹ Albeit a noisy signal, these statistics provide a general sense regarding the Treatise’s influence over time. It is instructive to use citations to the federal antitrust agencies’ merger guidelines as a comparison and baseline.

For our analysis, each ruling that referenced the Treatise counted as a single citation. The sample included 88 rulings. We did not distinguish between rulings that extensively relied on the Treatise versus those that merely referenced it in passing. The primary statistic of interest was the number of Treatise citations in a given time period divided by the total number of merger rulings during that time period. We undertook a comparable exercise with regard to the Merger Guidelines.⁹⁰ This citation rate adjusted the raw citation count to reflect time periods where there were few merger rulings. Because the total number of merger rulings in any year is usually small, we calculated the rates in five-year increments.

88. The single largest category of rulings that this analysis excluded entails judicial review of Antitrust Division consent decrees under the Antitrust Procedures and Penalties (Tunney) Act, Pub. L. No. 93-528, 88 Stat. 1708 (1974). Other rulings excluded from our analysis include, for example, decisions regarding state action immunity, jurisdictional or procedural matters.

89. In 1978, Volumes I through III of the Treatise were published. Volume IV, which includes Chapter 9 (Mergers: Generally and Horizontal) and Chapter 10 (Vertical Mergers), was first published in 1980. The Treatise was referenced only once in a merger context prior to 1980. *See* *Fruehauf Corp. v. Fed. Trade Comm’n*, 603 F.2d 345, 352 n.9 (2d Cir. 1979).

90. Although the DOJ—and subsequently DOJ and FTC—Merger Guidelines evolved over multiple iterations, they are referred to collectively as the Merger Guidelines. *See generally* U.S. DEP’T OF JUST. & FED. TRADE COMM’N, HORIZONTAL MERGER GUIDELINES (2010), *reprinted in* 4 Trade Reg. Rep. (CCH) ¶ 13,100 (Feb. 23, 2012) [hereinafter CURRENT MERGER GUIDELINES—2010]; U.S. DEP’T OF JUST. & FED. TRADE COMM’N, MERGER GUIDELINES (1992, revised 1997), *reprinted in* 4 Trade Reg. Rep. (CCH) ¶ 13,104 (Apr. 17, 1997) [hereinafter MERGER GUIDELINES—1992]; U.S. DEP’T OF JUST. & FED. TRADE COMM’N, MERGER GUIDELINES (1984), *reprinted in* 4 Trade Reg. Rep. (CCH) ¶ 13,103 (1988) [hereinafter MERGER GUIDELINES—1984]; U.S. DEP’T OF JUST. & FED. TRADE COMM’N, MERGER GUIDELINES (1982), *reprinted in* 4 Trade Reg. Rep. (CCH) ¶ 13,102 (Aug. 25, 2010) [hereinafter MERGER GUIDELINES—1982]; U.S. DEP’T OF JUST. & FED. TRADE COMM’N, MERGER GUIDELINES (1968), *reprinted in* 4 Trade Reg. Rep. (CCH) ¶ 13,101 (Feb. 23, 2012) [hereinafter MERGER GUIDELINES—1968].

Figure 1: Trends in Case Citation Rates in Federal Antitrust Merger Cases⁹¹

Despite this approach's many limitations, the overall citation pattern trends are instructive. The citation rate for the Merger Guidelines, particularly its dramatic increase after the issuance of the 1982 and 1984 Guidelines, is broadly consistent with prior analysis and the theory of "guideline institutionalization."⁹²

[This increase in citation rate] is not merely the result of the acceptance of superior ideas . . . nor does the increase seem consistent with a simple story of (possibly unwarranted) judicial deference to agency promulgations. . . . The guidelines themselves became legitimized and valued beyond the content of their ideas. The antitrust guidelines had acquired a power to influence the law because they were the antitrust guidelines In short, the antitrust guidelines had become a strong institution.⁹³

The Treatise's lower citation rate in the first few years after its initial publication in the late 1970s is unsurprising given that the Treatise was relatively new and because judges may have relied on other authorities. With regard to the Treatise, the citation rates remained relatively low until the 2000–2004 time interval. This 2000–2004 increase was fueled by citations beginning in 2000 and arguably reflects the courts' adopting particular arguments from the Treatise, for example, the Treatise's "extraordinary" gain approach to handling efficiencies,⁹⁴ the revision of the merger sections of the Treatise in a *new* edition of the Treatise that was published in 1998, and the

91. Data on file with author.

92. Hillary Greene, *Guideline Institutionalization: The Role of Merger Guidelines in Antitrust Discourse*, 48 WM. & MARY L. REV. 771, 806 (2006).

93. *Id.* at 812.

94. See *infra* Part VI.

influence of Hovenkamp on that new edition.⁹⁵ Over the years, the waxing and waning of the direct references to the Treatise has also arguably reflected judges' relative reliance upon the Merger Guidelines and the extent to which Treatise positions became embodied in the prevailing legal precedent.

While a citation analysis has value, it is a very blunt instrument for determining the nature of the influence and for examining more indirect influences. To better understand the evolution of influence associated with both the Treatise and the Merger Guidelines, we examine the treatment of efficiencies in merger case law.⁹⁶

VI. THE EVOLUTION OF THE TREATMENT OF EFFICIENCIES IN MERGER LAW AND POLICY

We begin with the key case of *FTC v. Procter & Gamble*, which was extensively litigated in the mid-1960s.⁹⁷ The FTC challenged Procter & Gamble's acquisition of Clorox, such acquisitions were described as conglomerate or product-extension mergers. The FTC Administrative Law Judge ("ALJ") found the acquisition unlawful. The Commission ultimately affirmed the ALJ, only to be reversed by the Sixth Circuit.⁹⁸ The Supreme Court reversed the Sixth Circuit and affirmed the FTC's order requiring divestitures.⁹⁹ The importance of the Court's ruling, for instant purposes, stems from its fairly cursory statement that "[p]ossible economies cannot be used as a defense to illegality. Congress was aware that some mergers which lessen competition may also result in economies but it struck the balance in favor of protecting competition."¹⁰⁰

The problems attendant to Justice Douglas's majority opinion did not pass unnoticed. To the contrary, Justice Harlan's concurrence was highly critical. He argued that this "increasingly important" area of conglomerate mergers required much greater learning and experience than was being accorded.¹⁰¹ He observed that the majority did not confront "the problem of efficiencies."¹⁰² Instead, Justice Harlan contended that, "[t]he Court attempts

95. Various supplements to the 1980 edition, which was the first to cover mergers, were published in intervening years. Hovenkamp participated in the writing of those supplements beginning in 1987.

96. There is extensive literature that includes surveys examining the treatment of efficiencies within merger decisions more generally. *See, e.g.*, Malcolm B. Coate, *Efficiencies in Merger Analysis: An Institutional View*, 13 SUP. CT. ECON. REV. 189, 228–30 (2005); Alan A. Fisher & Robert H. Lande, *Efficiency Considerations in Merger Enforcement*, 71 CALIF. L. REV. 1580, 1593–99 (1983); Jamie Henikoff Moffitt, *Merging in the Shadow of the Law: The Case for Consistent Judicial Efficiency Analysis*, 63 VAND. L. REV. 1697, 1708–23 (2010).

97. Fed. Trade Comm'n v. Procter & Gamble Co., 386 U.S. 568 (1967).

98. *Id.* at 570.

99. *Id.* at 581.

100. *Id.* at 580.

101. *Id.* at 582 (Harlan, J., concurring).

102. *Id.* at 597.

to brush the question aside by asserting that Congress preferred competition to economies.”¹⁰³ He challenged the majority’s formulation of this Congressional “preference” by transcending their unwarranted dichotomy articulated by the majority—competition versus economies. He returned to first principles and argued that antitrust seeks to protect competition and not competitors.¹⁰⁴

Justice Harlan advocated that after a showing of a sufficient likelihood of anticompetitive consequences, the analysis then should proceed to “examine and weigh possible efficiencies . . . to determine whether, on balance, competition has been substantially lessened.”¹⁰⁵ Justice Harlan’s sole elaboration upon this proposal was a single quotation of Donald Turner: “Where detriments to competition are apt to be ‘highly speculative’ it seems wisest to conclude that ‘possibilities of adverse effects on competitive behavior are worth worrying about only when the merger does not involve substantial economies.’”¹⁰⁶

The 1968 DOJ Merger Guidelines, written while Turner was Assistant Attorney General (“AAG”), reflect an efficiency analysis generally consistent with Turner’s 1965 article.¹⁰⁷ In 1969, District Court Judge Marovitz granted a preliminary injunction against the product-extension merger in *United States v. Wilson Sporting Goods*.¹⁰⁸ Despite noting that “[t]he defendant has not offered any countervailing economies which might be weighed against the adverse effects of the merger,” Marovitz discussed and endorsed an “economies defense.”¹⁰⁹ He expressly relied on both Justice Harlan’s concurrence and Turner’s conglomerate merger article. He did not reference the 1968 DOJ Merger Guidelines’ efficiencies section. After this extremely limited judicial treatment in the latter part of the 1960s, virtually no judicial rulings substantively addressed efficiency arguments in the merger context until 1979 when the Ninth Circuit in *RSR v. FTC* resoundingly rejected an efficiencies defense.¹¹⁰

103. *Id.*

104. *See id.*

105. *Id.* at 598

106. *Id.*

107. Compare MERGER GUIDELINES—1968, *supra* note 90, with Donald F. Turner, *Conglomerate Mergers and Section 7 of the Clayton Act*, 78 HARV. L. REV. 1313 (1965).

108. *United States v. Wilson Sporting Goods Co.*, 288 F. Supp. 543, 570 (N.D. Ill. 1968).

109. *Id.* at 566.

110. *RSR Corp. v. Fed. Trade Comm’n*, 602 F.2d 1317, 1325 (9th Cir. 1979). Another important case was *United States v. General Dynamics Co.*, 415 U.S. 486 (1974). On the impact of *General Dynamics* and the jurisprudence of the 1970s on merger efficiencies in the courts, see William J. Kolasky & Andrew R. Dick, *The Merger Guidelines and the Integration of Efficiencies into Antitrust Review of Horizontal Mergers*, 71 ANTITRUST L.J. 207, 214 (2003). (“The narrow opening to an efficiencies defense offered by *General Dynamics* was widened over the next five years by a series of non-merger Supreme Court decisions.”).

Despite the prevailing and, particularly with regard to the Ninth Circuit, continuing Supreme Court interpretation, an efficiencies *defense* was included in the 1982 DOJ Horizontal Merger Guidelines: in “extraordinary cases” the Department would allow for merger-specific efficiencies proven with “clear and convincing evidence” as “a mitigating factor for a merger that would otherwise be challenged.”¹¹¹ The Guidelines acknowledged efficiencies derived from “scale economies, integration of production facilities, or multi-plant operations which are already enjoyed by one or more firms in the industry.”¹¹² The 1984 revised Guidelines removed the “extraordinary” language and efficiencies were treated as a factor rather than as a defense.¹¹³ In addition, the list of possible efficiencies recognized was expanded to include “general selling, administrative, and overhead expenses.”¹¹⁴

William Kolasky and Andrew Dick characterize these efficiency-related changes in the early to mid-1980s as reflecting a transition between two schools of thought within antitrust.¹¹⁵ More specifically, they cast it in terms of a movement from the Chicago School which considered efficiencies “unmanageable” and was, therefore, quite negative regarding their use, to a Harvard School view, championed by Areeda and Turner,¹¹⁶ which “argued that rational antitrust policy required” its consideration and offered an approach to do so.¹¹⁷ On this point, the 1980 Treatise read:

In interpreting the *Clorox* language, moreover, observe that the court referred only to “possible” economies and to economies that

111. MERGER GUIDELINES—1982, *supra* note 90, ¶ 13,102, at 20,549-13 & n.53.

112. *Id.* at 20,549-13 n.53.

113. MERGER GUIDELINES—1984, *supra* note 90, ¶ 13,103, at 20,564; *see also* Andrew I. Gavil, *Secondary Line Price Discrimination and the Fate of Morton Salt: To Save It, Let It Go*, 48 EMORY L.J. 1057, 1119-22 (1999) (insightfully analyzing the role of an efficiency *defense* in an effort to dispel some of the “confusion” that has “plagued” antitrust regarding the “allotment of burdens of production and burdens of proof”).

114. MERGER GUIDELINES—1984, *supra* note 90, ¶ 13,103, at 20,564.

115. Kolasky & Dick, *supra* note 110, at 222.

116. For an overview of the Harvard School on merger efficiencies, see DANIEL J. GIFFORD & ROBERT T. KUDRLE, *THE ATLANTIC DIVIDE IN ANTITRUST: AN EXAMINATION OF US AND EU COMPETITION POLICY* 41-51 (2015).

117. Kolasky & Dick, *supra* note 110, at 222. The Chicago School’s antipathy to efficiencies analysis in mergers is not that the School believes efficiencies do not exist, but likely reflects an overall view that intervention should happen less often and a skepticism relating to the judiciary’s abilities to assess these efficiencies. Robert Pitofsky wrote that the Chicago School “would *infer* efficiency in a wide range of mergers” and “relax antitrust enforcement greatly to preserve opportunities to achieve those efficiencies. But they dismiss any thought of requiring proof of efficiencies on grounds that it is an issue that would be impossible to deal with in a court.” Robert Pitofsky, *Proposals for Revised United States Merger Enforcement in a Global Economy*, 81 GEO. L.J. 195, 211 (1992). Hovenkamp has stated that the Treatise “is not a work of economics, and it has never explicitly embraced any particular economic ‘school.’ . . . The *Antitrust Law* treatise is in fact something of an economics scavenger, picking and choosing among economics’ diverse theories for doctrine that is both theoretically defensible and administratively useful.” Hovenkamp, *Harvard, Chicago, and Transaction Cost Economics*, *supra* note 13, at 618.

“may” result from mergers that lessen competition. To reject an economies defense based on mere possibilities does not mean that one should reject such a defense based on more convincing proof.

....

In sum, the *Clorox* comment may be seen as a mere truism that does not define what constitutes a “lessening of competition.”¹¹⁸

What, for instant purposes, we refer to as the “Areeda–Turner approach” had been recommended by the ABA Section of Antitrust Law in 1981 but was subsequently rejected by then AAG William Baxter. While untangling the forces that influenced this shift is difficult, there is some reason to believe that the Treatise position on efficiencies could have been directly influential. Kolasky and Dick argue that “borrowing from Areeda–Turner, [AAG Paul McGrath] said the Division would look at efficiencies in determining whether the merger was anticompetitive at all.”¹¹⁹

The efficiencies defense occupied a more modest “recurring role” within a number of federal court rulings throughout the 1980s, following, in particular, the DOJ’s revised Merger Guidelines in 1984.¹²⁰ Most of these cases heavily referenced the Guidelines, though not always when assessing efficiency claims. Only two referenced the Treatise. With rare exception, as discussed below, none of these cases expressly grapples with the propriety of analyzing efficiencies nor, as a consequence, with the establishment of standards or approaches that will permit consistency for analyzing

118. 4 PHILLIP AREEDA & DONALD F. TURNER, ANTITRUST LAW: AN ANALYSIS OF ANTITRUST PRINCIPLES AND THEIR APPLICATION ¶ 941b, at 154 (1980).

119. Kolasky & Dick, *supra* note 110, at 220. Consistent with this view is the fact that the discussion of the justification for the change in efficiencies treatment by McGrath in an interview with the ABA uses similar arguments and language to the efficiencies section of the 1978 Areeda and Turner Treatise. As an aside, McGrath, who was AAG in 1984, was a Harvard Law School graduate and may have taken courses from either Turner or Areeda, both of whom were Harvard Law School faculty.

120. During a 1985 ABA Antitrust Panel discussion, Turner noted that “[t]here is a lot of dispute as to whether the efficiency defense should be recognized or not.” Panel Discussion with Richard C. Levin, Professor of Econ. & Mgmt., Yale Univ. & Janusz A. Ordover, Professor of Econ., N.Y. Univ., in 53 ANTITRUST L.J. 523, 530 (1985). Turner noted that the 1982 Merger Guidelines “were very tough on” such a defense and that the 1984 Merger Guidelines were “more hospitable.” *Id.* The FTC issued its own enforcement policy, Statement of the FTC Concerning Horizontal Mergers, concurrently with the DOJ’s release of its 1982 Merger Guidelines. *See generally* FED. TRADE COMM’N, STATEMENT CONCERNING HORIZONTAL MERGERS (1982), *reprinted in* 4 Trade Reg. Rep. (CCH) ¶ 13,200 (June 15, 1993). The FTC’s Merger Statement indicated that the agency could properly account for efficiencies evidence through its prosecutorial discretion at the pre-complaint stage, but “there are too many analytical ambiguities associated with the issue of efficiencies to treat it as a legally cognizable defense.” *Id.* at 20,904. The Treatise itself, Timothy Muris, as well as Alan Fisher and Robert Lande are each cited twice within this brief treatment in the Merger Statement. *Id.* *See generally*, Hillary Greene, *Agency Character and the Character of Agency Guidelines: An Historical and Institutional Perspective*, 72 ANTITRUST L.J. 1039, 1050–53 (2005) (comparing the FTC Merger Statement with the DOJ Merger Guidelines and exploring the FTC’s institutional features that contributed to the nature of its policy statement).

efficiencies.¹²¹ Instead, the court's focus upon whether the efficiencies are of a sufficient magnitude and, when they are, whether the efficiencies can be obtained through other means.¹²²

If one accepts the hypothesis that the Treatise influenced the 1984 Guidelines, then it would have, in turn, indirectly influenced the 1980s district court cases. The question—admittedly unanswerable—then becomes, in the absence of the Guidelines, what would have been the Treatise's influence? In the wake of *Clorox* and *RSR Corp.*, it is unclear that in the 1980s most of the district courts would have been as open to efficiencies arguments if the Guidelines had not sought to legitimize them. One can argue that the added authority of the Guideline institution was important as a channel of influence for ideas developed elsewhere including in the Treatise.

It was not until 1988, in *California v. American Stores Co.*, a case from the Central District of California and, therefore, directly controlled by the Ninth Circuit's ruling in *RSR Corp. v. FTC*, that a court squarely addressed the foundational issue regarding the availability of the efficiency defense.¹²³ The district court held that the Supreme Court had "clearly rejected" an efficiency defense.¹²⁴ Although the court still saw fit to opine on this non-issue when it expressed skepticism that if any efficiencies resulted, the court was "not convinced" that the savings would be passed on to consumers.¹²⁵

This long-simmering, albeit only sporadically acknowledged, issue would resurface a few years later in *FTC v. University Health*.¹²⁶ The hastily issued order delivered from the bench stated, "I am unconcerned by counsel's challenge that this case may present elements of first impression if the Court reviews and considers the efficiencies that might result from the transaction

121. For an example of such an exception, see *Fed. Trade Comm'n v. Univ. Health, Inc.*, 938 F.2d 1206 (11th Cir. 1991).

122. See, e.g., *United States v. Country Lake Foods, Inc.*, 754 F. Supp. 669, 680 (D. Minn. 1990) (denying a preliminary injunction, noting: "The Court finds these efficiencies relevant, not so much as an independent factor justifying the proposed acquisition, but as further evidence that the proposed acquisition will enhance competition," and referring to Guideline standards for efficiencies (footnote omitted)); *United States v. Rockford Mem'l Corp.*, 717 F. Supp. 1251, 1289 (N.D. Ill. 1989) (granting a preliminary injunction, and reasoning that the savings were insufficient to "produce a significant economic benefit to consumers" using the Guidelines as a standard); *Fed. Trade Comm'n v. Owens-Ill., Inc.*, 681 F. Supp. 27, 53 (D.D.C. 1988) (denying a preliminary injunction, and reasoning that "defendants' contention as to realization of economies [was] . . . the more persuasive"); *Fed. Trade Comm'n v. Bass Bros. Enters., Inc., Nos. C84-1304, C84-1311*, 1984 WL 355, at *22 (N.D. Ohio June 6, 1984) (granting a preliminary injunction and noting that "efficiencies . . . [had been] greatly exaggerated and [were] largely available through feasible alternative means other than merger").

123. *State v. Am. Stores Co.*, 697 F. Supp. 1125 (C.D. Cal. 1988).

124. *Id.* at 1133.

125. *Id.*

126. *Fed. Trade Comm'n v. Univ. Health, Inc.*, No. CV191-052, 1991 WL 117432 (S.D. Ga. Apr. 3, 1991).

that is proposed.”¹²⁷ The court then denied the FTC’s motion for a preliminary injunction. On appeal, the Eleventh Circuit reversed the district court and, more importantly for instant purposes, squarely addressed the role of an efficiency defense within the merger context.¹²⁸ The appellees argued that the “significant efficiencies” flowing from the merger meant it “would not substantially lessen competition.”¹²⁹ The FTC’s stark response was “that the law recognizes no such efficiency defense in any form.”¹³⁰ The Eleventh Circuit stated “that in certain circumstances, a defendant may rebut the government’s prima facie case with evidence showing that the intended merger would create significant efficiencies in the relevant market.”¹³¹ The appellees, however, had not “introduce[d] sufficient evidence to demonstrate that . . . any efficiencies [would result].”¹³² Owing to the weakness of the appellees’ efficiencies arguments, the court noted that it was “unnecessary . . . to define the parameters of this defense now.”¹³³

Central to the Eleventh Circuit’s ruling was its treatment of *Clorox*. In particular, the court noted that “[o]thers posit that the [*Clorox*] court merely rejected the use of insufficient or speculative evidence to demonstrate efficiencies; a limited efficiency defense to the government’s prima facie case, they argue, remains available.”¹³⁴ For this proposition, the court quoted the Treatise: “To reject an economies defense based on mere possibilities does not mean that one should reject such a defense based on more convincing proof” and it also referenced Professor Timothy J. Muris’s 1980 *Case Western Reserve Law Review* article.¹³⁵ The court then concluded, albeit in dicta, “an efficiency defense to the government’s prima facie case in section 7 challenges is appropriate in certain circumstances.”¹³⁶ Though the court did not specifically quote it, the Treatise discussed that it employs the terminology

127. *Id.* at *8. The court fused its analysis of the efficiencies with the acquired firm’s “deteriorat[ing]” status. *Id.*

128. Fed. Trade Comm’n v. Univ. Health, Inc., 938 F.2d 1206, 1209 (11th Cir. 1991).

129. *Id.* at 1222.

130. *Id.*

131. *Id.*

132. *Id.* (emphasis added).

133. *Id.* at 1222 n.30. A discussion follows regarding the various difficulties associated with assessing efficiencies and cites to a number of authorities including the Treatise—“advocating partial defense limited to types of efficiencies”—and the Merger Guidelines—“claims about expected efficiency gains are ‘easier to allege than to prove.’” *Id.* at 1222–23 n.30, 1223. Areeda and Turner are just one of a number of extremely thoughtful commentators the court identified who have provided “suggestions” regarding “the proper scope of an efficiency defense.” *Id.* at 1223 n.30. Others discussed were: Robert Bork, Alan Fisher, Robert Lande, Timothy J. Muris, Paul Rogers, Lawrence Sullivan, and Oliver Williamson. *Id.*

134. *Id.* at 1222.

135. *Id.* (citing Timothy J. Muris, *The Efficiency Defense Under Section 7 of the Clayton Act*, 30 CASE W. RES. L. REV. 381 (1980)). See *supra* note 133 for a more extensive treatment of the Treatise position.

136. *Univ. Health, Inc.*, 938 F.2d at 1222.

of efficiency “defense” to refer to “a defense to a prima facie case” or “to the rebuttal of a first order inference” regarding anticompetitive effects in violation of section 7.¹³⁷

In sum, the Eleventh Circuit’s standard in *FTC v. University Health* draws expressly and heavily upon the Treatise. After this 1991 ruling, until the next pivotal judicial decision in 2000, five of the ten merger rulings that address efficiencies claims directly reference the “prima facie” language in *FTC v. University Health*.¹³⁸ None of those five decisions, however, reference the Treatise by name.

In retrospect, it appears that the Supreme Court’s ostensible rejection of an efficiencies defense may have dramatically chilled its invocation for over a decade. In the early 1980s, through their Guidelines and resulting litigation, DOJ in particular enhanced the profile of the efficiency defense.¹³⁹ The judicial rulings regarding mergers at this time addressed efficiencies without having meaningfully probed the more fundamental and underlying issue regarding the propriety of their consideration. It would seem, then, that the ability to fine tune the legal standards applicable to the efficiencies defense would not likely occur until there was a more formal reckoning of their basic legitimacy.

In the mid-1990s, much of the discourse regarding the treatment of efficiencies in the antitrust merger context occurred in the antitrust agencies. An important contribution to this discourse was the FTC’s 1996 Staff Report, *Anticipating the 21st Century: Competition Policy in the New High-Tech, Global Marketplace*.¹⁴⁰ Commenting six months after the report’s release, FTC Chairman Robert Pitofsky observed that the report had “accelerated and focused debate on the treatment of efficiencies in merger enforcement.”¹⁴¹ Pitofsky noted that a joint FTC–DOJ taskforce was meeting to address how to “incorporat[e] efficiencies as a mitigating factor in merger enforcement.”¹⁴² With regard to the taskforce’s greatest challenge— “[w]hich efficiencies and

137. AREEDA & TURNER, *supra* note 118, ¶ 941 b, at 153–54.

138. See Fed. Trade Comm’n v. Cardinal Health, Inc., 12 F. Supp. 2d 34, 61 (D.D.C. 1998); Fed. Trade Comm’n v. Staples, Inc., 970 F. Supp. 1066, 1088 (D.D.C. 1997); United States v. Long Island Jewish Med. Ctr., 983 F. Supp. 121, 137 (E.D.N.Y. 1997); Fed. Trade Comm’n v. Butterworth Health Corp., 946 F. Supp. 1285, 1300 (W.D. Mich. 1996); United States v. Mercy Health Servs., 902 F. Supp. 968, 975 (N.D. Iowa 1995).

139. See Kolasky & Dick, *supra* note 110, at 222–23.

140. 1 FED. TRADE COMM’N STAFF, ANTICIPATING THE 21ST CENTURY: COMPETITION POLICY IN THE NEW HIGH-TECH, GLOBAL MARKETPLACE (1996), *available at* http://www.ftc.gov/system/files/documents/reports/anticipating-21st-century-competition-policy-new-high-tech-global-marketplace/gc_v1.pdf.

141. Robert Pitofsky, Former Chairman, Fed. Trade Comm’n, FTC Staff Report on Competition Policy: Six Months After (Nov. 7, 1996), *available at* <http://www.ftc.gov/public-statements/1996/11/ftc-staff-report-competition-policy-six-months-after>.

142. *Id.*

how much do they matter?”—Pitofsky’s starting point was clear.¹⁴³ “In my view, the Areeda–Turner Treatise (as is so often the case in antitrust analysis) offers the most thoughtful guideline to evaluating different types of efficiency.”¹⁴⁴ As such, the Treatise that appeared to have influenced both DOJ’s Merger Guidelines in the 1980s, as well as their subsequent interpretation by the courts, was poised yet again to influence guideline formulation and, not surprisingly, their subsequent interpretation as well.

In 1997, the agencies revised the 1992 Merger Guidelines by expanding the efficiencies section. The 1997 Merger Guidelines state that:

The agency will not challenge a merger if cognizable efficiencies are of a character and magnitude such that the merger is not likely to be anticompetitive in any relevant market. To make the requisite determination, the Agency considers whether [the] cognizable efficiencies likely would be sufficient to reverse the merger’s potential to harm consumers in the relevant market, e.g., by preventing price increases in that market.¹⁴⁵

This approach to *prosecutorial* discretion differed somewhat with that of the Hovenkamp-revised second edition of the Treatise in 1998. While the Treatise and the Guidelines both sought to consider efficiencies, the Treatise explicitly questioned the ease with which a court assess post-merger price effects. More specifically, the Treatise:

[W]ould not require any calculus comparing likely price increase effects with likely efficiency effects and showing that resulting post [-]merger prices [would] be no higher than premerger prices. In the great majority of circumstances, certainly including all reasonably close cases, the state of the science does not permit such refined showings.¹⁴⁶

Instead the Treatise recommends that if a significant anticompetitive threat exists, then it “would require a showing of ‘extraordinary’ gains tending to show that postmerger output would be at least as high as premerger output,

143. *Id.* (emphasis omitted).

144. *Id.*; see also Robert Pitofsky, *Proposals for Revised United States Merger Enforcement in a Global Economy*, 81 GEO. L.J. 195, 220–21 (1992) (providing a more nuanced assessment of the Treatise’s recommendations regarding efficiencies). Though beyond this Essay’s scope, the treatment of efficiencies within the merger context also implicates more fundamental questions regarding the goals of antitrust. See, e.g., Blair & Sokol, *Welfare Standards*, *supra* note 7, at 2538–41 (discussing welfare tests and their application to merger efficiencies); John B. Kirkwood & Robert H. Lande, *The Fundamental Goal of Antitrust: Protecting Consumers, Not Increasing Efficiency*, 84 NOTRE DAME L. REV. 191, 224–27 (2008) (endorsing the elevation of consumer welfare above economic efficiency).

145. MERGER GUIDELINES—1992, *supra* note 90, ¶ 13, 104, at 20,573–13.

146. 4A PHILLIP E. AREEDA, HERBERT HOVENKAMP & JOHN L. SOLOW, ANTITRUST LAW: AN ANALYSIS OF ANTITRUST PRINCIPLES AND THEIR APPLICATION ¶ 971f (rev. ed. 1998).

and thus that postmerger prices would be no higher than premerger prices.”¹⁴⁷

While this “extraordinary” gains language first appeared in the 1998 Treatise, the underlying arguments regarding a limited use of efficiencies had, of course, long been a part of the broader antitrust discourse including in prior Treatise installments. And it is just this phrasing that the court in *Heinz* adopted and subsequent rulings frequently reiterated when addressing merger efficiencies.

In 2000, the D.C. District Court denied the FTC’s request for an injunction against the Heinz/Beech–Nut merger.¹⁴⁸ Judge Robertson, referencing *Philadelphia National Bank* and the Merger Guidelines, held that the FTC had established a prima facie case.¹⁴⁹ With regard to efficiencies, Robertson noted the revised guidelines provided that “efficiencies are properly considered in merger analysis”¹⁵⁰ and then quoted the guidelines regarding the types of efficiencies recognized.¹⁵¹ Ultimately, the court accepted the defendant’s argument that the merger was necessary “to challenge Gerber’s dominant market share” because it would increase their efficiencies which, in turn would enable them to compete.¹⁵²

The FTC sought and received an injunction pending an expedited appeal of Judge Robertson’s ruling. The D.C. Circuit panel, Judges Ginsburg, Tatel and Garland, issued a per curiam decision that characterized the efficiency defense as “novel.”¹⁵³ The court also noted a lack of precedent because the “Supreme Court ha[d] not addressed [this issue] since the 1960s (and then, unfavorably),” the D.C. Circuit had itself “never addressed” the issue, and “the antitrust enforcement agencies have only recently clarified their views.”¹⁵⁴ Though the court noted the value of “recognizing an efficiencies defense in principle” its role in the instant case was complicated owing to “the high concentration levels present.”¹⁵⁵ The court then quoted the Treatise which supported an “efficiencies defense but [would] requir[e] ‘extraordinary’ efficiencies where the ‘HHI [Herfindahl–Hirschman Index] is well above 1800 and the HHI increase is well above 100.’”¹⁵⁶ After quoting the Treatise, the court referenced the Guidelines statement “that

147. *Id.*

148. Fed. Trade Comm’n v. H.J. Heinz, Co., 116 F. Supp. 2d 190, 201 (D.D.C. 2000). This remains the only case since the 1997 Merger Guidelines to focus on efficiencies. *Id.* at 198–99.

149. *Id.* at 195–96.

150. *Id.* at 198 (quoting FED. TRADE COMM’N STAFF, *supra* note 140, at 1) (internal quotation marks omitted).

151. *Id.* at 199.

152. *Id.* at 198–99.

153. Fed. Trade Comm’n v. H.J. Heinz, Co., No 00-5362, 2000 WL 1741320, at *2 (D.C. Cir. Nov. 8, 2000) (per curiam).

154. *Id.*

155. *Id.*

156. *Id.* (quoting 4A AREEDA, HOVENKAMP & SOLOW, *supra* note 146, ¶ 971f, at 44).

‘[e]fficiencies almost never justify a merger to monopoly or near-monopoly.’”¹⁵⁷

Immediately after the D.C. Circuit’s initial ruling in *Heinz*, the D.C. District Court again addressed efficiencies in *FTC v. Swedish Match*.¹⁵⁸ The court relied heavily upon the *Heinz* ruling that it had issued just one month earlier. In particular, it noted the lack of clarity regarding the legitimate use of efficiencies to rebut the government’s prima facie case. It also included *Heinz*’s quotation of the Treatise regarding the need for a showing of “extraordinary” efficiencies, given a high and increased level of concentration. The Merger Guidelines were included in a string cite. Next in 2001 came the D.C. Circuit’s final ruling in *Heinz* requiring “proof of extraordinary efficiencies” for “high market concentration levels.”¹⁵⁹ Since that time, another 13 federal court rulings have substantively addressed efficiency defenses within merger actions. Seven of those rulings explicitly relied upon the *Heinz* standard of “extraordinary” efficiencies derived from the Treatise as well as substantial reliance on the Merger Guidelines. Several of the cases that did not reference this “extraordinary” language involved circumstances in which this criterion was not particularly germane.¹⁶⁰

Perhaps most telling for instant purposes is the recent district court ruling in *Saint Alphonsus Medical Center–Nampa, Inc. v. St. Luke’s Health System, Ltd.* in 2014¹⁶¹ and its circuit court appeal in 2015.¹⁶² For more than two

157. *Id.* (alteration in original) (quoting MERGER GUIDELINES—1992, *supra* note 90, ¶ 13.104, at 20,573-13).

158. Fed. Trade Comm’n v. *Swedish Match*, 131 F. Supp. 2d 151, 171-72 (D.D.C. 2000).

159. Fed. Trade Comm’n v. H.J. Heinz Co., 246 F.3d 708, 720 (D.C. Cir. 2001).

160. One court denied the preliminary injunction noting that it was “convinced that there [would] be efficiencies resulting from the merger,” but then added that “the efficiencies of the merger [had] not played a determinative role in [the] case.” Fed. Trade Comm’n v. *Foster*, No. CIV 07-352 JBACT, 2007 WL 1793441, at *49, *57 (D.N.M. May 29, 2007). A second case referenced the Merger Guidelines and *Heinz* for other reasons, but it found that efficiencies were not meaningfully contested. In particular, the court found that the defense expert’s statement that he would not apply the Guidelines analysis and offer of a “guesstimate[]” about efficiencies did not satisfy the burden. Fed. Trade Comm’n v. *Whole Foods Mkt., Inc.*, 502 F. Supp. 2d 1, 48-49 (D.D.C. 2007) (internal quotation marks omitted). In a third case, the court emphasized factual analysis, and the sole reference to the Guidelines was one sentence at the end of the section finding that an efficiency defense was not met. *United States v. Oracle Corp.*, 331 F. Supp. 2d 1098, 1175 (2004). The other cases within this category are similarly varied. See generally *ProMedica Health Sys., Inc. v. Fed. Trade Comm’n*, 749 F.3d 559 (6th Cir. 2014), *petition for cert. filed*, No. 14-762 (U.S. Dec. 22, 2014); *United States v. Bazaarvoice, Inc.*, No. 13-cv-00133-WHO, 2014 WL 203966 (N.D. Cal. Jan. 8, 2014); Fed. Trade Comm’n v. *Lab. Corp. of Am.*, No. SACV 10-1873 AG (MLGx), 2011 WL 3100372 (C.D. Cal. Mar. 11, 2011).

161. *Saint Alphonsus Med. Ctr.–Nampa, Inc. v. St. Luke’s Health Sys., Ltd.*, Nos. 1:12-CV-00560-BLW, 1:13-CV-00116-BLW, 2014 WL 407446, at *23-24 (D. Idaho Jan. 24, 2014).

162. *Saint Alphonsus Med. Ctr.–Nampa Inc. v. St. Luke’s Health Sys., Ltd.*, No. 14-35173, 2015 WL 525540, *8-11 (9th Cir. Feb. 10, 2015).

decades, spanning from *University Health*¹⁶³ in 1991 to *Heinz*¹⁶⁴ in 2000, the courts have observed that the Supreme Court has yet to address the role of efficiencies within the merger context and, in each instance, those subordinate courts have continued their oftentimes substantial reliance upon the Treatise to help guide them. In *St. Luke's*, the district court delineates the absence of Supreme Court precedent, the presence of “trends” among the lower courts regarding efficiencies, and incorporates a direct—albeit arguably unnecessary—reference to the Treatise as well.¹⁶⁵ The Ninth Circuit affirmed the lower court’s preliminary injunction and its ruling addresses certain key decision including *Heinz* and the most recent incarnation of the Merger Guidelines, issued in 2010,¹⁶⁶ which closely tracks the 1997 version with regard to efficiencies.¹⁶⁷ The Circuit Court decision was skeptical of any efficiencies being able to overcome anticompetitive effects of a merger.

This narrow paper trail of judicial rulings in this matter, then, suggests that the Treatise exerts an ongoing, though ostensibly more attenuated, influence. But, the Treatise continues to quite literally shape the legal discourse. During the Ninth Circuit’s oral argument in *St. Luke's*, FTC counsel Joel Marcus repeatedly invokes the Treatise in a manner similar to legal precedent and the Guidelines.¹⁶⁸

VII. CONCLUSION: INFLUENCING THE COMMON LAW

How does academic literature influence the common law? As a starting point, one can consider jurisprudential development as a contest of ideas in which relevant and well-reasoned arguments can, in theory, influence the discourse. While this argument has merit, at least directionally, it is crucial to consider how various ideas gain attention and hence influence and this depends in turn on the demand for and the supply of ideas in judicial settings. The demand for ideas depends, for example, on the degree to which the law is changing, perhaps because of new legislation or regulatory rules, changes in the supporting social science, changes in the types of fact patterns that present cases of first impression, and the lack of judicial guidance or what is perceived as questionable judicial guidance. Similarly, the supply of ideas depends on factors including changes in social science and changes in institutions that give credibility to some ideas

163. Fed. Trade Comm’n v. University Health, Inc., 938 F.2d 1206 (11th Cir. 1991).

164. Fed. Trade Comm’n v. H.J. Heinz, Co., No. 00-5362, 2000 WL 1741320 (D.C. Cir. Nov. 8, 2000) (per curiam).

165. *Saint Alphonsus Med. Ctr.—Nampa, Inc.*, 2014 WL 407446, at *23.

166. See *supra* note 90.

167. See Carl Shapiro, *The 2010 Horizontal Merger Guidelines: From Hedgehog to Fox in Forty Years*, 77 ANTITRUST L.J. 49, 55 (2010).

168. See *generally* Oral Argument, *Saint Alphonsus Med. Ctr.—Nampa, Inc. v. St. Luke’s Health Sys., Ltd.*, No. 14-35173 (9th Cir. Nov. 19, 2014), 2014 WL 6853683.

In the context of U.S. antitrust merger law, many of these factors increased the demand for ideas. The Hart–Scott–Rodino Act essentially shifted the focus of merger law to the federal antitrust agencies as well as emphasizing prediction.¹⁶⁹ Economics, a key foundation for understanding the effects of various types of market conduct, was rapidly evolving during the 1970s. Those changes are both ongoing and wide-ranging; they encompass both theoretical understandings and econometric tools. From the 1980s onward, there were substantial increases in globalization and increased importance of information-based industries, while mergers became increasingly strategic—as opposed to conglomerate—in nature. Given such developments, it was inevitable that merger law, as with any area of law, would lag at times. These gaps or shortcomings in guidance were further exacerbated by, for example, the Supreme Court’s unwillingness to accept substantive merger cases.

On the supply side, the federal antitrust agencies began issuing public statements of the agencies’ merger prosecution policies. The resulting Merger Guidelines became increasingly relied on and arguably eventually became an “institution” in and of themselves.¹⁷⁰ Furthermore, changes in social science provided fertile soil for the growth of new ideas. Along these lines, it is interesting to consider the role of an antitrust treatise in the law’s development. Both the Merger Guidelines and the Treatise were influential in part because they provided one-stop authoritative guides for antitrust analysis of mergers. The Guidelines were well-exercised and debated; the Treatise was a more expansive and up-to-date source for a summary of the state of the law, a discussion of relevant debate, and well-argued recommendations for what the law should be. The Treatise is complementary to the Merger Guidelines.

Individual legal analyses, of course, do this too. But, putting aside questions about the novelty or superiority of the arguments, the Treatise has major advantages in terms of potential influence. Particularly in earlier times, access to and identification of the appropriate individual law review articles was much more costly than it is now. A comprehensive treatise helped address that problem. Furthermore, this Treatise, or shall we say *The Treatise*, has the authority of top legal scholar authors and a long-standing, carefully cultivated reputation for top quality. And, as we know, market power is permissible when it derives from superior acumen.

169. The antitrust agencies also shaped the development of law by their decisions of which cases to bring.

170. See Greene, *supra* note 92, at 834 (“Collectively, the statistics and case studies are evidence that the merger guidelines exist as an institution with influence apart from their congruence with the law.”).